Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department of	)	
Public Utility Control to Retain Regulatory	)	PR Docket No. 94-106
Control of the Rates of Wholesale Cellular	)	
Service Providers in the State of	)	
Connecticut	)	

OPPOSITION TO MOTION FOR STAY

Bell Atlantic NYNEX Mobile,[1] by its attorneys and pursuant to Section 1.45 of the Commission's Rules, hereby opposes the motion of the Connecticut Department of Public Utility Control ("DPUC") to stay the Commission's Report and Order in this proceeding (FCC 95-199, released May 19, 1995) ("Order"). The DPUC asks that the Order be set aside while it pursues an appeal to the United States Court of Appeals for the Second Circuit. The DPUC's motion is untimely and must be dismissed on that ground alone. On the merits, the motion fails to meet any of the hurdles the Commission and the courts have established for obtaining a stay pending appeal. The motion should be promptly denied.

[1]Bell Atlantic NYNEX Mobile, the successor in interest to the Bell Atlantic Metro Mobile Companies, operates cellular telephone systems in six of the seven MSAs and RSAs in Connecticut. Its interests are thus directly affected by the DPUC's motion, which seeks to preserve the DPUC's regulation of wholesale cellular rates.

I. THE DPUC'S MOTION IS UNTIMELY.

The Commission released its Order on May 19, 1995. The Order took effect that same day.[2] The DPUC did not seek a stay at that time (despite its claims now of irreparable harm resulting from the Order). The DPUC had 30 days, until June 19, to ask that the Order be set aside, modified or otherwise reconsidered.[3] It could have sought a stay at any time during that 30 days as well, either alone or in conjunction with a petition for reconsideration of the Order. Again, it did not.

Now, nearly two months after the Commission's Order took effect, and after the DPUC has gone to court to challenge the Commission, the DPUC asks the Commission to grant it a reprieve. The DPUC fails to explain why it failed to ask for relief earlier. Given the significant delay, its claims of irreparable harm ring hollow. If it truly believed there was a likelihood of irreparable harm, the DPUC should have (and could have) sought relief months ago. Its failure to do so then should bar its late attempt now.

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[2]Section 1.103 of the Commission's Rules generally provides that "the effective date of any Commission action shall be the date of public notice of such action as that latter date is defined in §1.4(b) of these Rules." Section 1.4(b) states that public notice of a non-rulemaking action is its release date -- in this case, May 19. (The Order expressly held that this proceeding "is an adjudicatory-type proceeding, not a rulemaking." Order at n. 82.)

[3]See Section 405(a) of the Communications Act, 47 U.S.C. §405(a) ("A petition for reconsideration must be filed within 30 days from the date upon which public notice is given"); and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. The Commission and the courts have held that the Commission has no authority to waive the 30-day deadline. Mary R. Kupris, 68 R.R.2d 63 (1986); Reuters Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986).

In any event, the Commission cannot as a matter of law grant a stay, because the time for further action by the Commission regarding the Order has expired. The Communications Act and the Commission's Rules require that any action seeking to set aside or reconsider a Commission action must be filed within 30 days of public notice. See n.3, supra. Similarly, Section 1.108 of the Rules states that the Commission may, on its own motion, "set aside any action made or taken by it within 30 days from the date of public notice." There is, in short, a clear deadline by which a party or the Commission itself must act. If that deadline passes, the action is no longer subject to being set aside or stayed by the Commission.

Although it ignored the June 19 deadline for seeking any relief from the Order at the Commission, the DPUC has filed an appeal to the Second Circuit. It is entitled to pursue that appeal, but the proceeding is no longer properly before the Commission. This is confirmed by the federal statutes governing petitions for review of Commission actions. The DPUC's petition for review was filed pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), which states that appeals are to be governed by the Chapter 158 of Title 28 of the United States Code. Section 2348 of that chapter, 28 U.S.C. §2348, states, "The court of appeals has jurisdiction of the proceeding on the filing and service of a petition for review. . . . and has exclusive jurisdiction to make and enter, on the petition, evidence and proceedings set forth in the record on review, a judgment determining the validity of, and enjoin, setting aside, or suspending, in whole or in part, the order of the

agency." The court itself may order a stay. But at this late date, the Commission cannot.[4]

The DPUC ignores these bars to its untimely stay request. The Commission thus need not consider the merits of the motion, but should dismiss it as procedurally defective.

II. THE DPUC'S PETITION IS MERITLESS.

In requesting a stay pending appeal, "it is the movant's obligation to justify the court's exercise of such an extraordinary remedy."[5] Stay of an agency decision is warranted only where the petitioner has shown that it is likely to prevail on the merits of its appeal, that it will be irreparably harmed absent a stay, that others will not be harmed, and the public interest will be furthered in granting the stay.[6] The Commission will stay its action only where the movant convincingly

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[4] The DPUC's reliance on Fed. R. App. P. 18 to support its motion is misplaced. That rule's direction that an appellant ordinarily first seek a stay from the agency does not override the agency's statutory deadlines for seeking such relief. Otherwise, those deadlines would be rendered meaningless. Rule 18 contemplates that an appellant will exhaust its administrative remedies pursuant to the law governing those remedies. The DPUC failed to do so.

[5] Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985).

[6] Application of Wireless Co., L.P., DA 95-1412 (released June 23, 1995), at ¶13; WMATA v. Holiday Tours, Inc., 551 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 295 F.2d 921 (D.C. Cir. 1958).

demonstrates that all four of these elements have been met.[7] The Motion meets none of these tests.

A. The DPUC's Appeal is Unlikely to Succeed. The DPUC claims that the Order is "fatally flawed" for one principal reason: the Commission "denied the DPUC's petition under a standard that it had not previously articulated and that is inconsistent with both the Budget Act and the Commission's Second Report and Order."[8] The alleged new "standard" was, the DPUC says, "evidence of a lack of investment by the carriers in CMRS facilities and the future impact on the market by the entry of PCS." (Motion at 3.) This is flatly wrong.

First, the Commission did not impose any such standard as a prerequisite to grant of the petition. To the contrary, the Commission adopted a flexible approach to enforcing the Budget Act which permitted states to submit, and the Commission to consider, a broad range of information in order to assess market conditions. Thus the Second Report did not set criteria that states must meet, but instead held "that a state should have discretion to submit whatever evidence the state believes is persuasive regarding market conditions." 9 RCC Rcd. at 1504. It identified several types of "pertinent" information but did not exclude consideration of other information, nor did it constrain the Commission's ability to

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[7]E.g., WATS Related and Other Amendments of Part 69 of the Commission's Rules, 62 RR 2d 36 (1987) (denying stay pending appeal); Inside Wiring Detariffing, 61 RR 2d 1486 (1986) (denying stay); Storer Communications, Inc., 101 FCC 2d 434 (1985) (denying stay).

[8]GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411 (1994)

consider such other information. The Order is fully consistent with this approach. It reaffirmed that "we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). . . . No single factor, standing alone, would necessarily tip the balance for or against a particular state petition." Order at ¶¶16, 27. Because, in short, the Commission never adopted a set of fixed standards to which either it or a state would be restricted, the Order cannot be said to "change" those standards.

Second, the DPUC's claim that it had no notice that the Commission would consider evidence as to PCS entry and carrier investment is equally wrong. The Second Report specifically identified evidence as to "opportunities for new entrants that could offer competing services, and an analysis of existing barriers to such entry" as relevant. 9 FCC Rcd. at 1505. This factor clearly encompassed PCS entry. Similarly, the Second Report stated that it would consider indications of anticompetitive behavior. Id. The Order fully explained why evidence that a carrier is limiting network investment in order to restrict output would be the type of anticompetitive behavior relevant to assessing market conditions. While the DPUC may not agree that entry into the CMRS market or carrier investment should be relevant, they were clearly within the types of information described in the Second Report.

Third, the plain fact is that the DPUC fell far short in providing evidence on any of the illustrative factors which the Commission identified as pertinent in the Second Report. Thus, even were the DPUC correct that PCS entry and carrier

investment levels should not have been considered, its Petition was nevertheless properly denied. The Order measured the DPUC's showing against the factors identified in the Second Report, and correctly found that showing to be insufficient. It pointed to the critical fact that the DPUC had itself failed to conclude that cellular rates were unreasonable, and in fact had conceded that the record was "inconclusive."[9] It pointed to the lack of any evidence at all as to consumer dissatisfaction. And it pointed to declining cellular rates and existing vigorous competition between the cellular carriers. Order at ¶¶ 68-70. There were thus multiple grounds on which the Commission denied the petition, independently of its discussion of new carrier entry and existing carrier investment.

The DPUC also argues that it is likely to succeed in its appeal because the Commission erred in several of its findings. Motion at 6. Again, it principally challenges the Commission's discussion of new competition in the CMRS market. Id. The DPUC continues to ignore the vast changes occurring in the wireless industry. The Commission properly looked ahead to consider new competition

[9]The Commission also correctly found that the DPUC's investigation "did not yield sufficient evidence to support a finding -- by the DPUC itself -- that market conditions fail to protect consumers." Order at ¶ 68. The DPUC does not (nor could it) question this conclusion in the Order. It alone is fatal to the Motion for Stay, for it confirms that Section 332(c)'s test -- that market conditions are failing to protect consumers -- was not met by the DPUC.

from PCS and other competing mobile service providers. That was unquestionably within the Commission's flexible authority to implement Section 332(c).[10]

Most of the DPUC's Motion is merely an effort to reargue the same points it made in its Petition. But it fails to come close to showing why the Commission misapplied Section 332(c) or otherwise exceeded its statutory authority. Instead, it chooses to ignore its own inability to conclude that rates in Connecticut were unjust or unreasonable. Given that fact, particularly when combined with the other evidence supporting the Commission, there is no basis to conclude that the Commission is likely to be reversed on appeal.

B. There Is No Irreparable Harm. The Commission requires that "to show irreparable harm, 'the injury must be both certain and great; it must be actual and not theoretical.' "[11] The DPUC does not meet this standard. It recites irreparable harm but fails to demonstrate, as it must, precisely who would be harmed or how such harm would occur.

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[10]Section 332(c) is worded in general terms which allow the Commission substantial discretion to determine how to implement it. Applicable caselaw on judicial review of agency actions interpreting such statutory provisions, including precedent in the Second Circuit, clearly indicates that the Commission's Order must be upheld. See Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984); Allegheny Elec. Co-op, Inc. v. FERC, 922 F.2d 73, 80 (2d Cir. 1990) ("great deference" must be given to an agency's interpretation); Grocery Mfrs. of America v. Gerace, 755 F.2d 993, 1001 (2d Cir. 1985).

[11]Deferral of Licensing of MTA Commercial Broadband PCS, DA 95-1410 (released June 23, 1995) at ¶ 13, quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

The DPUC first claims the "State Movants" (it and the State Attorney General) are the ones harmed (Motion at 8), but can point only to unspecified "administrative problems" should the court appeal succeed and state regulation of rates be reinstated. This is plainly inadequate. It then refers to a "potential adverse impact on consumers." Motion at 9. But "bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The DPUC fails to show why any harm to consumers would occur. To the contrary, its scheme regulated only wholesale, not retail, rates. As the parties in this proceeding showed, there is no nexus between that scheme and protection of consumers from unreasonable rates, nor did the DPUC attempt to establish one.[12]

Finally, the DPUC asserts that "existing carries will have the potential to use their market power to the disadvantage of new entrants." Motion at 10. This is again speculative and thus inadequate. There is no record evidence that carriers have suppressed new entrants or could do so. Moreover, new competitors are in fact entering the market. There are today two new carriers, Sprint and Omnipoint, which hold licenses to provide PCS throughout Connecticut, in direct competition to cellular carriers. Nextel is constructing facilities to provide competitive wireless service.

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[12]E.g., Comments of The Bell Atlantic Metro Mobile Companies, filed September 10, 1994, at 3-6; Order at ¶68.

C. A Stay Would Harm CMRS Providers and Consumers. Congress and the Commission have found that CMRS rate regulation may impose numerous costs and burdens that are harmful to the public interest. They have concluded that such regulation can distort competition, skew marketplace incentives, discourage innovation, and cause higher prices for the public.[13] Setting aside the Order and reinstating the DPUC's rate regulation would implicate all of the same public interest concerns. Moreover, cellular carriers in Connecticut would again become subject to having to justify their wholesale rates, as well as to update tariffs and thereby provide their competitors with competitively sensitive information. The harms endemic to the DPUC's regime were documented by the parties to this proceeding. Reinstating the DPUC's scheme would resurrect those harms and undercut all of the benefits of eliminating regulatory intrusion into this competitive market.[14]

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[13]See, e.g., Second Report, 9 FCC Rcd. at 1418, 1421 ("Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices"); H.R. Rep. No.103-111, 103d Cong., 1st Sess. at 261 (1993) ("State regulation can be a barrier to the development of competition in this market").

[14]It bears noting that only eight states sought to retain regulation of cellular rates, and that no petitioning state -- except Connecticut -- has opposed the Commission's preemption orders. The DPUC's stand-alone position is illustrative of the extreme positions it is taking in an effort to regulate cellular carriers in the face of Congress' policy as enacted in the Budget Act. For example, the DPUC has tentatively declared that cellular carriers, as the price for not being rate-regulated, are ineligible to receive compensation from local exchange carriers for terminating calls. DPUC Investigation Into Wireless Mutual Compensation Plans, Docket No. 95-04-04, June 5, 1995 (Draft Decision). This decision clearly violates the Commission's directive in the Second Report that LEC's must be subject to the "principle of mutual compensation," and that CMRS providers are entitled to compensation for terminating traffic. 9 FCC Rcd. at 1498.

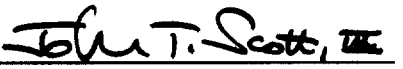
The Commission has previously refused to stay its repeal of rules it found impeded the benefits of competition, concluding that preserving those rules while an appeal was litigated would be contrary to the public interest: "We do not wish to maintain unnecessary barriers that hamper the industry from responding to marketplace incentives that foster increasing use of the nation's telecommunications assets."[15] That same principle applies here and compels denial of a stay.

III. CONCLUSION

The DPUC's Motion for Stay is too little and too late. It fails to meet any of the prerequisites for the extraordinary relief it seeks. And it is grossly untimely. The Commission has been provided with no basis to set aside its Order. For these reasons, the Motion should be promptly denied.

Respectfully submitted,

BELL ATLANTIC NYNEX MOBILE

By: 

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July 21, 1995

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[15]Petition for Removal of the Structural Separation Requirement and Waiver of Certain Tariffing Requirements, 9 FCC Rcd. 3053, 3055 (1994).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Opposition to Motion for Stay" was sent by first-class mail, postage prepaid, this 21st day of July, 1995, to the following persons:

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